



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 27, 1994

Mr. Michael J. Cosentino
Deputy City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR94-699

Dear Mr. Cosentino:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 27344.

The City of Austin (the "city") has received two requests for copies of the proposal Varner & Associates submitted for the development of property located at 1102 East 11th Street. Although the proposal is dated September 18, 1992, you aver that contract negotiations with Varner & Associates are ongoing. You further state that, if the negotiations are not concluded in the "near future," the city's Planning and Development Department will once again solicit proposals for the development of this property.

You believe that sections 552.104, .105, and .110 of the Government Code except portions of the requested information from required public disclosure. Consistent with the requirements of section 552.303, you have submitted copies of the requested information for our review; additionally, you have marked those portions of the documents for which you claim exceptions. We note that you have claimed section 552.104, in combination with section 552.105 and/or section 552.110 for all of the portions you have marked except one, which contains a partial list of Varner & Associates clients. With respect to the partial list of clients, you claim only section 552.110.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104's principal purpose is to protect a governmental body's interest by preventing a

competitor or bidder from gaining an unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. The exception is not intended to protect the interests of private parties. Open Records Decision No. 592 (1991) at 9. To withhold information under section 552.104, a governmental body must demonstrate potential harm in a particular competitive situation. Open Records Decision No. 541 at 4. Furthermore, once the competitive bidding process has ceased and a contract has been awarded, section 552.104 will not except from required public disclosure either information submitted with the bid or the contract itself. *Id.* at 5.

In our opinion, you have demonstrated that the city may be harmed by the release of the information for which you have claimed section 552.104. Consequently, the city need not release these portions to the requestor. We next consider whether the city must release that portion of the documents containing a partial list of Varner & Associates' clients.

In a case such as this in which a requestor seeks information, the release of which implicates the privacy of a third party, the governmental body may decline to release the information for the purpose of requesting a decision from the attorney general. Gov't Code § 552.305(a). The governmental body need not submit reasons as to why the information should be withheld or released, *id.* § 552.305(c), and our office generally invites the third party to submit written reasons for withholding or releasing the information, *see id.* § 552.305(b).

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. You appear to contend that the partial client list may be trade secret information. Accordingly, we need only address the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . .

[but] a process or device for continuous use in the operation of the business [It may] . . . relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757, cmt. b (1939).

If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim that the information is trade secret if the person establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. On the other hand, when an agency or company fails to provide relevant information regarding factors necessary to make a claim under section 552.110, a governmental body has no basis for withholding the information under section 552.110. See Open Records Decision No. 402 (1983) at 2.

Prior to sending a letter to Mr. Cal E. Varner of Varner & Associates inviting him to submit his written arguments as to why the requested information should be withheld or released, this office received from him a letter stating that release of the information "would severely compromise my company's strategy in this process." We received no additional information in response to our letter. Mr. Varner's conclusory statement is insufficient to demonstrate that the requested partial client list is a trade secret that the city may withhold under section 552.110. We therefore conclude that the city must release it.

Our resolution of your request under sections 552.104 and 552.110 of the Government Code eliminates the need to consider section 552.105. Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymerly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LRD/rho

Ref.: ID# 27344

Enclosures: Marked documents

cc: Mr. Tom Hatch
Architects
100 East 8th Street
Austin, Texas 78702
(w/o enclosures)

Mr. Mark C. Rogers
1104 East 10th Street
Austin, Texas 78702
(w/o enclosures)

Mr. Cal E. Varner
Varner & Associates, Inc.
1101 Navasota, Suite One
Austin, Texas 78702
(w/o enclosures)